IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 834 OF 2003
ALONGWITH
SECOND APPEAL NO. 835 OF 2003

Devnath Ramnaval Sharma ... Appellant

V/s

Sadashiv Narayan Jaywant ... Respondent

Shri G.S. Godbole for the appellant.

Shri M.D. Angal for the respondent.

CORAM: P.V. KAKADE, J.

DATED: 29TH SEPT., 2004.

P.C.:

1. Heard learned advocates for both parties. Perused the record.

2. Rule. Rule made returnable forthwith.

3. Both these appeals can be conveniently disposed of by a common order in view of the facts and circumstances of the case.

3. Without going into the details regarding merits

involved, it must be noted that the Civil Court raised issue regarding proof of payment to the defendant of Rs.1200/- by cheque No.471 dated 20.2.1971 and Rs.1000/- in cash as an advance amount towards the agreement of lease dated 18.2.1971. In this regard, it must be noted that the question involved at the trial stage was whether the plaintiff had proved such payment by primary evidence. Evidently there was no primary evidence available due to the destruction of bank record and, therefore, the plaintiff sought to rely on secondary evidence by producing the pass-book of the bank having relevant entries. That aspect was adjudicated against the plaintiff on various grounds culminating to the effect that the plaintiff was unable to establish such payment of rent by way of cheque through the bank.

4. The matter was carried to the lower Appellate Court wherein various grounds were raised by the plaintiff-appellant in respect of leading of secondary evidence and matter pertaining to the same aspect. However, it is brought to my notice that, while adjudicating the appeal by a common judgment, the lower Appellate Court Judge did not utter a whisper in that regard in the course of his judgment dated 25.8.2003 and dismissed the appeals. Now, in these second appeals,

the appellant has sought to raise substantial questions of law as follows:-

(1) Whether the Court below overlooked that by production of the counterfoil of cheque No. 471 dated 20.2.1971 of Canara Bank, Kalyan, which showed the name of the respondent as Payee, the fact of issuance of cheque had been duly proved by the appellant and in the absence of an explanation from the respondent, the Courts below ought to have held that the issuance of said cheque towards the deposit has been duly proved ?

(2) whether the Courts below failed to note that since the appellant had examined Shri Madhukar Sawant, officer of the Bank at Exh.125 who had deposed that the original record for the year 1971 is destroyed, the pass book was liable to be admitted as secondary evidence, since the debit entry in the pass book clearly indicated that the amount of Rs.250/- had been debited to the account of the appellant and credited in the name of the respondent, the payment was duly proved ?

(3) Whether the learned Judge of the appellate Court has failed in its duty under Order 41 Rule 31 of the C.P.C. by failing to independently discuss all the issues which were discussed and considered by the Trial Court.

5. In my considered view, these are the issues which should have been adjudicated by the lower Appellate Court in proper perspective on the basis of available evidence which has not been done. It is to be noted that, it is now well settled position of law that under Sec.100 of the C.P.C., the finding of fact howsoever erroneous recorded by the lower Appellate Court would be binding on the High Court in second appeal and it cannot be gone into as those are questions of fact. However, at the same time, when the position similar to the one which has arisen in the present appeals arises, then it becomes substantial question of law, because the lower Appellate Court has remained totally silent on the issue and has not recorded its finding in clear terms of those issues. Under the circumstances, it is necessary that both these matters are required to be remanded to the lower Appellate Court for adjudication on the issues noted above only.

6. Hence, the order of the lower Appellate Court dated 25.8.2003 is hereby set aside. The matter is remanded to the Additional District Judge, Kalyan to record his findings on the issues raised in this order after giving opportunity to both the parties of hearing on the said issues.

Parties to appear before the Addl. District Judge, Kalyan, on 22.11.2004 when the learned Addl. District Judge, Kalyan, shall fix the date of hearing in the light of the observations made hereinabove.

7. It is further clarified that the learned Addl. District Judge is at liberty to hear both parties on all the relevant issues involved including the issues raised by this Court in the body of the judgment.

The appeal be heard expeditiously and shall be disposed of in any case within two months from the date of receipt of this order. Writ be sent immediately accordingly.

Consequently, the civil applications in both second appeals also stand disposed of.

This order of remand is made by consent of both parties.

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